

STATE OF MICHIGAN
COURT OF APPEALS

ELMER'S CRANE & DOZER, INC.,

Plaintiff-Appellee,

v

AWM CORPORATION, d/b/a NATIONAL
CONCRETE CONSTRUCTION ASSOCIATES,

Defendant,

and

JOSEPH F. DOA,

Defendant-Appellant.

UNPUBLISHED

June 22, 2006

No. 266666

Roscommon Circuit Court

LC No. 04-725031-CK

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant Joseph Doa (hereafter "defendant") appeals by right from the trial court's orders granting plaintiff's motion for summary disposition and denying his motion for reconsideration. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 2004, plaintiff supplied material to AWM Corporation, d/b/a National Concrete Construction Associates ("National"), for work on a Wal-Mart project in Houghton Lake, Michigan (the "project"). Defendant was the president and treasurer of National.

The general contractor, Hallmark Construction Company ("Hallmark"), paid National \$267,829.90 for its work on the project. Hallmark's payment was given to National after it received a partial unconditional waiver of plaintiff's lien rights and after National issued a check to plaintiff for \$127,000 for plaintiff's work on the project. Defendant signed National's check that was issued to plaintiff. Before plaintiff received payment on the check from National, the defendant's bank was instructed to stop payment on the \$127,000 check.

In his deposition, defendant stated that to the best of his knowledge, the check from Hallmark cleared into the National account, but National's checking account statement for

August 2004, only showed eight deposits totaling \$251,513.88 with the largest single deposit being \$59,410.00. There is no deposit reflecting the amount paid by Hallmark. Additionally, the daily balances reflected on the bank statement show that the account had a positive balance on only one day in August prior to August 27. On August 5 the account had a balance of \$3,143.65. Everyday from August 2 through August 26 the account was overdrawn. The evidence does not explain what happened to the funds from Hallmark; it simply shows that the funds were not deposited into National's corporate checking account.

Plaintiff argued before the trial court that defendant violated the Michigan Builders Trust Fund Act (MBTFA), MCL 570.151 *et seq.*, by failing to pay plaintiff, and that both civil and personal liability could be imposed on defendant as an officer of the corporation. Plaintiff argued that defendant committed fraud when he induced plaintiff to sign a partial unconditional waiver in exchange for a check that was written upon insufficient funds.

Defendant argued to the trial court that he did not divert or misappropriate the funds at issue. Rather, a third party placed the stop payment on the check and that third party was acting adversely to defendant. Defendant also denied that he was aware that National's checking account contained insufficient funds to cover the \$127,000 check.

The trial court granted plaintiff's motion for summary disposition based on its determination that defendant merely rested on his pleadings, and he did not respond with more than mere denials, allegations or supposition.

A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding a motion for summary disposition, we consider pleadings, affidavits, depositions, admissions, and other documentary evidence. In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Id.* (Internal citations omitted).]

The MBTFA is a penal statute, but our Supreme Court recognizes a civil cause of action for its violation. *DiPonio Const Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48; 631 NW2d 59 (2001), citing *BF Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966). The MBTFA applies to funds paid to contractors and subcontractors for products and services provided to them under their construction contracts. *DiPonio, supra* at 47.

(1) the defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for labor or materials provided on a construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. [*DiPonio, supra* at 49.]

Additionally, officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully. *People v Brown*, 239 Mich App 735, 739-740; 610 NW2d 234 (2000). “[A] corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation.” *Id.*, quoting *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). If a defendant personally misappropriates funds after they are received by the corporation, he can be held personally responsible under the MBTFA. *Brown, supra* at 743-744.

In the instant case, the evidence shows that National was a subcontractor and received funds from Hallmark for the project. There is no dispute that a stop payment was placed on the \$127,000 check from National to plaintiff and which defendant signed. Plaintiff has not been paid in full for the materials or services it provided to National on the project. Accordingly, the MBTFA has been violated. The issue at hand is whether defendant *personally* misappropriated funds after National received them thereby allowing him to be held individually liable.

The elements set forth in *DiPonio* for a civil action under the MBTFA require that the defendant retained or used the funds for any purpose other than to pay subcontractors or materialmen. *DiPonio, supra* at 49; MCL 750.152. Similarly, for individual liability to attach to an officer, that officer must have *personally* misappropriated the funds after receipt by the corporation. *Brown, supra* at 743-744.

Plaintiff provided evidence that (1) Hallmark made payment to National; (2) the check from Hallmark never made it into National’s account; (3) defendant signed a check to plaintiff; (4) a stop payment was placed on plaintiff’s check, and (5) plaintiff was not paid. Plaintiff has not, however, set forth evidence showing that defendant personally misappropriated the funds or personally participated in the diversion of funds after National received them. Therefore, plaintiff did not meet its initial burden under MCR 2.116(C)(10) to support its position concerning all elements of its claim. See *Graham, supra* at 672. Accordingly, the burden never shifted to defendant to show a genuine issue of material fact, and the trial court erred when it based its decision on defendant’s not meeting its burden under MCR 2.116(C)(10).

Because the motion for summary disposition was improperly granted we need not address, the issues of damages, attorney fees, costs and interest.

We reverse and remand for further proceedings on plaintiff's complaint. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter